Supreme Court, U. S.
FILED
MAR 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1282

GREGORY Y. LAU,

Petitioner,

—v.—

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES; LEONARD F. CHAPMAN, JR., COMMISSIONER OF IMMIGRATION AND NATURALIZATION SERVICE; AND S.F. PERRYMAN, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, CLEVELAND, OHIO.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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February 1976

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IN THE

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No. -------

GREGORY Y. LAU,

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—v.—

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES; LEONARD F. CHAPMAN, JR., COMMISSIONER OF IMMIGRATION AND NATURALIZATION SERVICE; AND S.F. PERRYMAN, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, CLEVELAND, OHIO.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on October 17, 1975.

Jurisdiction

The judgment of the Court of Appeals was entered on October 17, 1975. A petition for rehearing was denied by the Court of Appeals on November 25, 1975. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the Immigration and Naturalization Service may deny a deportable alien discretionary relief without stating any reason or explanation for said denial.

2. Whether failures of the Immigration and Naturalization Service to give notice of and reasons for denials of discretionary relief to an alien, which failures are direct violations of Immigration and Naturalization Service regulations, constitute violations of the due process guarantees of the Fifth Amendment.

Citations to Opinions Below

The February 21, 1975, opinion of the United States District Court for the Southern District of Ohio, Hon. Robert M. Duncan, U.S.D.J., is set forth in the Appendix at p. 3a . The opinion of

the United States Court of Appeals for the Sixth Circuit, affirming the District Court, is set forth in the Appendix at p. 1a.

Constitutional Provisions Involved

1. United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case

Petitioner, plaintiff below,[1] is a citizen of Hong Kong and an alien in this country. Mr. Lau was born in Hong Kong and lived there until August of 1969.

Mr. Lau entered this country in 1969 as a non-immigrant on a temporary visa. He received his

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[1] Hereinafter the parties will be referred to according to their designation in the trial court.

B.A. degree from Capital University in Columbus, Ohio, in 1972. While attending Capital University Mr. Lau worked in the respiratory therapy unit at Childrens Hospital in Columbus.

In the fall of 1973 Mr. Lau was accepted and participated in an intensive accelerated respiratory therapy program at the University of Chicago. He received a diploma as a respiratory therapist, and returned to Childrens Hospital in Columbus, where he has been employed since.

Presently Mr. Lau works forty hours per week as a full time respiratory therapist at Childrens Hospital and also an additional forty hours per week as a full time education coordinator in the respiratory care division at Doctors Hospital of Columbus, Ohio.

Mr. Lau's work at Childrens Hospital involves the treatment of young children with cystic fibrosis and other serious respiratory ailments. His work is primarily in the intensive care ward. He is responsible for monitoring those patients who are aided by various respiratory equipment, and for the use and adjustment of that equipment consistent with changes in the patient's conditions. Mr. Lau's work at Childrens Hospital is of a serious nature, and he is personally credited with saving the lives of several patients. Mr. Lau has a superb work record. He is greatly respected by the physicians and

others at the hospital. Because of his educational background and experience Mr. Lau has become one of the foremost respiratory therapists in Ohio.

His work as educational coordinator at Doctors Hospital involves the training and supervision of approximately seventy respiratory technicians. He lectures to respiratory technicians, nurses and physicians regarding new developments in the field. He also is responsible for certain research projects and for the development of a library for respiratory therapy. Finally, he is the liaison between Doctors Hospital and local universities in regard to respiratory care.

Mr. Lau has no criminal conviction or arrest record of any kind. He has never been charged with any falsification or other deception regarding immigration matters, he does not use any illegal drug and he does not use alcohol. He is not, and has never been, a ward of the state or the recipient of any kind of public relief. He has no endangering mental or physical afflictions. He has no political beliefs or associations that might be construed as contrary to the interests of the United States. The evidence indicates that he is a model citizen, well liked and respected by those around him.

In addition to plaintiff's background and qualifications it was elicited at the District Court that there is a present severe shortage of respiratory therapists in central Ohio. There are simply not enough qualified people to fill the available positions as respiratory therapists.

Mr. Lau was admitted into this country as a nonimmigrant on a temporary visa. He was required by the Immigration and Naturalization Service[2] to periodically reapply for extensions of his visa every six months. This he did by preparing a form I-538 and mailing it to the I.N.S. office. These requests for discretionary extension were routinely granted many times over the years.

In May of 1974, as he had done so many times before, Mr. Lau prepared and filed his I-538 form with I.N.S. He was never notified of any decision on this request for extension.

Plaintiff continued to live and work as usual for a period of several months. Finally, in September of 1974, Mr. Lau was ordered to appear at a deportation hearing to show cause why he should not be deported for staying in this country

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[2] Hereinafter the Immigration and Naturalization Service will be referred to as I.N.S.

past the expiration (June, 1974) of his visa. It was at this point that plaintiff was informed that his request for an extension of his visa had been denied. This was the first instance in which Mr. Lau was denied discretionary relief without any reason or explanation.

Plaintiff appeared at the hearing on October 24, 1974, and was ordered deportable because he had, technically, overstayed his visa. However, he was given until December 31 to voluntarily depart and that date was later extended to January 31, 1975, at the request of United States Senator Robert Taft who interceded on Mr. Lau's behalf.

On November 14, 1974, plaintiff filed a Petition to Classify Preference Status of Alien on Basis of Profession or Occupation, form I-140. Although this application was denied, plaintiff was never notified of that denial and only discovered it during the course of litigation in the District Court. Thus, for the second time, INS denied a request for discretionary relief by Mr. Lau without notifying him of their decision and without giving any reason or explanation for that decision.

In addition to the two applications discussed above (forms I-538 and I-140), plaintiff through

his counsel wrote two letters to District Director Perryman of the INS requesting discretionary stays of Mr. Lau's voluntary departure date. These requests were submitted on December 23, 1974, and February 5, 1975, respectively. Each request was denied without explanation or reason.

Thus, plaintiff filed four separate requests for discretionary relief from deportation: form I-538, form I-140, the letter of December 23, 1974, and the letter of February 5, 1975. All four requests were summarily denied. At no time was plaintiff provided a rationale or explanation for any of these decisions against him.

The plaintiff filed a complaint in the District Court for the Southern District of Ohio, seeking an order enjoining the defendants from proceeding with the deportation of the plaintiff.[3] The District Court denied the request for a permanent injunction. The plaintiff then appealed to the

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[3] Originally this case was brought as *Lau v. Saxbe* rather than Levi. However, in granting plaintiff's motion for stay of mandate Mr. Justice Stewart substituted the name of Edward H. Levi as Attorney General of the United States. To the extent that that is insufficient to formally substitute parties, plaintiff hereby moves this Court to substitute Edward H. Levy in place of William Saxbe. This request is made pursuant to Rule 25(d), Federal Rules of Civil Procedure.

United States Court of Appeals for the Sixth Circuit.

The Court of Appeals passed on the federal questions tendered herein. That Court held:

> It is appellant's position that the District Director was required to give reasons for his denial of discretionary relief and that such denial should be treated as wholly arbitrary in the absence of a statement or explanation by the District Director of his denial...
>
> Appellant has produced no authorization holding which supports his position in this case, and who have found none.

Appendix at p. 1a & 3a.

Subsequently plaintiff requested a stay of mandate pending the filing of a writ of certiorari. That motion was granted by Mr. Justice Stewart (No. A-586).

REASONS FOR GRANTING A WRIT

1. This Court has never directly ruled upon an important question of constitutional law involved herein. Further, there is now a clear split of opinion on the issue among the Circuit Courts of Appeals.

One of the questions presented here has obvious importance in the nationwide administration of the immigration laws -- Can the Immigration and Naturalization Service ("INS") refuse a deportable alien discretionary relief without stating any reason? While the Court had the opportunity to discuss the requirement of reasons in *Jay v. Boyd*, 351 U.S. 345, 360-61 (1956), it declined the occasion and held that petitioner was provided with sufficient reasons when told that the information was confidential, the disclosure of which would be prejudicial to the public interest, safety or security. Moreover, the Court, in *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972), declined the invitation of the Government to reach the question of whether the Executive could give "any reason or no reason," holding that appellee was given a facially legitimate and bona fide explanation in that case.

This case, then, can be the opportunity for the Court to announce, on the one hand, the extent to which *Jay v. Boyd* limits the due process rights of aliens within this country,[4] or, on the other hand, the degree to which its application is limited to the peculiar circumstances required by national security. That is, this case clearly presents the question not reached in the earlier two cases of whether or not the INS must give a deportable alien a reason for its denial of discretionary relief.[5]

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[4] Of course, an alien within the United States, unlike one applying for entry at the border, is entitled to the full benefits of procedural due process under the aegis of the Fifth Amendment to the United States Constitution, *Sung v. McGrath*, 339 U.S. 33 (1950), *Yamataya v. Fisher*, 189 U.S. 86 (1903).

[5] It must be noted that the fact of deportability cannot of itself be an acceptable explanation for a denial of discretionary relief. The irrelevance of the deportation hearing and the order finding appellant deportable is apparent. It is only after deportability is ordered that the opportunity for exercise of discretion arises. Thus, *all* applicants for discretionary relief have been found deportable, and the problem for the INS officials (in this case the District Director, Mr. Perryman) is to choose which of these deportable aliens will be given discretionary relief and which will not. It follows that the fact of deportability itself cannot be grounds for distinguishing among applicants since they are all by definition deportable. If they were not they would have no need for discretionary relief in the first place.

In the case at bar the Government successfully renewed in the Sixth Circuit the position it first advanced here in *Kleindienst v. Mandel* that "the Executive in its sole and unfettered discretion" could give "any reason or no reason." 408 U.S. at 769. In this case the Government convinced the Sixth Circuit that "no reason" was necessary. Of course, such a ruling tramples on the traditional view that an alien is entitled to relief if the denial was an abuse of discretion, made without a rational explanation. *See, e.g., Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715, 719 (2nd Cir. 1966). Under the decision below, discretion is no longer necessary since without reasons given the Courts cannot judge their rationality. Until the opinion below, no court had taken such an arbitrary and narrow view.[6] Rather, the import of the Court of Appeals

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[6] Although in most reported cases the courts have upheld as rational the explanations given by the INS for denials of discretionary relief. However, in a few instances courts have held that, even with an enunciated reason, the decision was abusive. See, for example, *Rassano v. INS*, 492 F2d 229 (7th Cir. 1974); *Cubillos-Gonzalez v. INS*, 352 F2d 782 (9th Cir. 1965); *United States ex rel. Exarchou v. Marff*, 265 F2d 504 (2d Cir. 1959); *Bergman v. INS*, 351 F2d 401 (9th Cir. 1965).

decisions with the exception of the Sixth is that a reason is necessary! *Loza Bedoya v. I.N.S.* 410 F.2d 343, 346 (9th Cir. 1969); *Hang v. I.N.S.* 360 F.2d 715, 719 (2d Cir. 1966); *Ahrens v. Rojas*, 292 F.2d 406, 411 (5th Cir. 1961); *Obrenovic v. Pilliod*, 282 F.2d 874, 876 (7th Cir. 1960)[7]

Since the Government is taking the position the denials of discretionary relief may be made without reason and is now supported in its position by the Sixth Circuit, the issue raised by this Petition is of the utmost national significance and affects literally thousands of persons

[7] Most of the Court of Appeals decisions on this point seem to *assume* the question of whether any reason is necessary. They then go on to consider whether the reason given in each particular case is a rational one, and therefore not an abuse of discretion. One court has even gone so far as to suggest that factual findings upon which a discretionary decision is predicated must pass the substantial evidence test, and that a written decision of the administrative agency must set out clearly the ground which forms the basis for denial of discretionary relief, "so that the appellate bodies within the agency and the reviewing courts are able to ascertain whether the decision is arbitrary, capricious or not supported by reasonable, substantial and probative evidence . . . ." *Jarecha v. I.N.S.*, 417 F.2d 220, 225 (5th Cir. 1969).

annually. If the Court of Appeals decision in this case is allowed to stand, two results will almost certainly follow. First, the Immigration and Naturalization Service will be encouraged to omit explanations for all future discretionary decisions because, while a given reason might be held irrational or abusive, a total failure to give a reason will avoid the question of rationality altogether. Second, judicial review of I.N.S. discretion will effectively be curtailed, leaving this administrative agency free to act upon its own instincts, including whatever prejudices and prejudgments may influence its decisions from time to time. The issue should not be left unresolved by this Court.[8]

[8] While the Immigration and Naturalization Service is admittedly in a unique position among federal administrative agencies, because of the particular "client group" with which it is concerned, this Court's recent decisions regarding other administrative agencies clearly indicate a desire for rationality and accountability in the exercise of discretion. This is true even though judicial review of such decisions is of a limited nature. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974).

2. The Court of Appeals has decided a basic issue of constitutional law in a manner in direct conflict with a consistent line of controlling decisions of this Court. Moreover, it has done so in a backhanded manner by refusing to even mention this issue in its opinion.

As indicated above, Mr. Lau filed four separate requests for discretionary relief from deportation: form I-538 (extension of visa), form I-140 (petition to classify alien on basis of occupation), and the letters of December 23, 1974, and February 5, 1975, requesting stays of deportation.

With regard to Mr. Lau's I-538 application, 8 C.F.R. Section 214.2(f)(7), referring to such applications, reads as follows:

> Decision on application for extension, permission to transfer to another school, or permission to accept or continue employment. *The applicant shall be notified of the decision, and if the application is denied, of the reason therefor.* (emphasis added).

Defendants never notified plaintiff of their decision to deny his I-538 petition. Needless to say, they also did not provide him with the reason for that denial.

With regard to Mr. Lau's I-140 petition, 8 C.F.R. section 204.1(c)(5), referring to such petitions, states:

> Interview and Decision. The petitioner shall be notified of the decision, and if the petition is denied, of the reasons therefor and of his right to appeal in accordance with the provisions of Part 103 of this chapter.

Again, defendants totally failed to comply with the above regulation. They did not notify plaintiff that his petition had been denied.

Plaintiff's letters of December 23, 1974, and February 5, 1974, were written to District Director Perryman and requested postponements of Mr. Lau's voluntary departure date. The District Director's authority and obligations concerning such requests are set out in the following regulations:

> 8 C.F.R. Section 243.4 Stay of Deportation . . . The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate. *Written notice of the disposition of the alien's request shall be served upon him,* but neither the making of the request nor the failure to receive notice of the decision thereon shall relieve or excuse the alien from presenting himself for

> deportation at the time and place designated for his deportation.[9] (emphasis added).

8 C.F.R. section 244.2 Extension of time to depart. Authority to extend the time within which to depart voluntarily . . . is within the sole jurisdiction of the district director . . . *Written notice of the district director's decision shall be served upon the alien*, and no appeal may be taken therefrom. (emphasis added).

Once again defendants failed to follow their own regulation. Mr. Lau's requests were summarily denied but no reasons were given.

The Court of Appeals makes no mention whatsoever of these regulatory violations in its opinion, although the issue was briefed and argued.

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[9] The latter clause of this regulation, as the District Court correctly noted is intended to prevent a situation where an alien would file such a request at the last minute and then ignore his departure date in reliance on this regulation. On the other hand, the "disclaimer clause" does not relieve the I.N.S. from their obligation to follow the rest of the regulation, which they have failed to do in the present case.

Mr. Lau contends that the Court of Appeal's cavalier attitude toward these indisputable regulatory violations was incorrect as a matter of law.

The case of *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954), established the basic tenet in regard to the present question by holding that regulations prescribing procedures to be followed in processing an alien's application for suspension of deportation have the force and effect of law and violations of such regulations constitute a denial of due process.

As stated by Justice Harlan in *Service v. Dulles*, 354 U.S. 363, at page 372, (1957)

> [R]egulations validly prescribed by a government administrator are binding upon him as well as the citizen, and . . . this principle holds even when the administrative action under review is discretionary in nature.[10]

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[10] Not every technical violation of an administrative regulation rises to the level of a due process violation. The violations involved in this case clearly do. One relevant question seems to be whether the regulation was designed to govern internal agency procedure rather than to protect any interest of the objecting party. See *Vitarelli v. Seaton*, 359 U.S. 535 (1959); see also *Violations by agencies of their own Regulations*, Harv. L. Rev. 87: 629-55 Jan. '74.

Further, an alien has a right to have his application considered in conformity with regulations. *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir. 1961), *cert. denied*, 366 U.S. 950 (1961); *Sovich v. Esperdy*, 319 F.2d 21 (2d Cir. 1963).

At trial the government admitted its failure to follow its own regulations. However, the District Court and Court of Appeals refused to recognize such patent and repeated breaches as violations of due process. The plaintiff was haughtily mistreated by the INS, without a modicum of lipservice paid to procedural fairness. This Court should reassert, through the instant case, its commitment to the proposition that regulations established to govern the conduct of the INS must be fully and evenly obeyed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit. In addition, it is respectfully suggested that a summary reversal on the papers is appropriate because the decision by the court below so clearly fails to take into consideration established principles of constitutional law.

Respectfully submitted,

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February 1976

APPENDIX

Appendix A

Opinion of the Court of
Appeals Below

NO. 75-1422

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

OCT 17 1975

JOHN P. HEHMAN, Clerk

GREGORY Y. LAU Plaintiff-Appellant v. WILLIAM SAXBE, Acting Attorney General of the United States; LEONARD F. CHAPMAN, JR., Commissioner of Immigration and Naturalization Service; and S. F. PERRYMAN, District Director of Immigration and Naturalization Service at Cleveland Defendants-Appellees	ORDER

BEFORE: PHILLIPS, Chief Judge; MARKEY, Chief Judge of the Court of Customs and Patent Appeals*; and LIVELY, Circuit Judge.

This is an appeal from the denial of discretionary relief in deportation proceedings. The appellant does not appeal from the deportation order, but maintains that the District Director of Immigration and Naturalization Service abused his discretion in failing to grant appellant a further postponement of his departure date after deportation had been ordered and a voluntary departure date had been agreed upon. It is appellant's position that the

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*The Honorable Howard T. Markey, sitting by designation.

District Director was required to give reasons for his denial of discretionary relief and that such denial should be treated as wholly arbitrary in the absence of a statement or explanation by the District Director of his denial. It is appellant's position that the undisputed evidence shows that he is a person of good character who is making a valuable contribution to the community in which he lives and that in the face of such a showing the District Director has abused his discretion in denying further postponement of his departure.

Appellant has produced no authoritative holding which supports his position in this case, and we have found none. The District Judge filed a comprehensive opinion and order which we believe properly disposes of all of the issues raised on appeal. Accordingly, the judgment of the district court is affirmed for the reasons set forth in the opinion and order of District Judge Robert M. Duncan entered on February 21, 1975.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

Appendix B
Opinion of the District
Court Below

FILED
JOHN D. LYTER, CLERK
FEB 21 3 00 PM '75
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gregory Y. Lau, :
Plaintiff :
v. : Civil Action No. 75-62
William Saxbe, et al., :
Defendants :

OPINION AND ORDER

Plaintiff, a citizen of Hong Kong, Commonwealth of Great Britain, has been an alien resident of the United States since he entered this country in 1969 on a student (F-1) visa. This visa was renewed on several occasions and finally expired on June 23, 1974. On June 19, 1974, plaintiff filed with the Office of Immigration and Naturalization Service (INS) in Cincinnati, Ohio, a Form I-538 application for extension of stay. Paragraph 14 of the amended complaint alleges that defendants "failed and refused to respond" to this application; the Form I-538 itself, Government's Exhibit 1 (hereinafter, "Exhibit") at page 2, reflects that the application was denied on August 21, 1974.

On October 24, 1974, a deportation hearing was held at which plaintiff conceded that he was in the country beyond the date permitted by his student visa. Exhibit at 18. Plaintiff sought and obtained permission to leave the country voluntarily, and he waived his right to appeal the hearing officer's decision that he was a deportable alien. Exhibit at 15-14. He was ordered to leave the country voluntarily by December 31, 1974, in lieu of being deported.

On November 14, 1974, plaintiff filed a Form MA-750-A "Petition to Classify Preference Status of Alien on Basis of Profession or Occupation" and an accompanying "Statement of Qualifications of Alien." Exhibit at 34-29A. Paragraph 22 of the amended complaint alleges that defendants "failed and refused to respond" to this application. The record reflects, Exhibit at 44, that the Department of Labor determined on January 8, 1975, that plaintiff's education, which consists of a Bachelor of Arts degree from Capital University, Columbus, Ohio, an intensive one-month course in respiratory therapy at the University of Chicago, and some instruction in advanced respiratory therapy at the Columbus Technical Institute, did not qualify plaintiff for a preference priority under 18 U.S.C. §1153(a)(3).

On December 23, 1974, plaintiff requested through counsel an extension of time in which to depart, Exhibit at 39-38. In a letter dated December 26, 1974, defendant Perryman, District Director, informed plaintiff that

> in accordance with my decision in this case, you have been granted an extension of the Immigration Judge's order to January 31, 1975. Be further advised that this is a final extension of this privilege of voluntary departure and should you fail to depart by that date, a Warrant of Deportation will be considered in your case along with arrangements by this Service to effect your deportation to Hong Kong.

Exhibit at 40.

In a letter dated January 8, 1975, Richard Kowalchik, Deportation Officer, responded to plaintiff's counsel's letter of December 23, 1974. This letter provided as follows:

> Please be advised that your client has been granted an extension of the Immigration Judge's order to January 31, 1975. Please refer to this Service's letter to Mr. Lau dated December 26, 1974. Be further advised that if the petition he filed with this Service on November 20, 1974, for third preference classification was approved, he would not be considered for immediate immigrant visa issuance as visa allotments under the third preference category in this instant case are unavailable. It is our further understanding that there has been no visa allotments under this third preference category for natives of Hong Kong since 1966. Furthermore, there is no authority under current regulations to allow Mr. Lau to remain in the United States for an indefinite time to await an immigrant visa on the basis of an approved petition.
>
> If Mr. Lau does not depart from the United States within the time alloted him, a Warrant of Deportation will be considered along with arrangements by this Service to effect his deportation to Hong Kong.

Exhibit at 42-41.

On January 20, 1975, plaintiff wrote defendant Perryman a letter requesting a re-evaluation of his case. On January 27, 1975, Mr. Kowalchik replied:

> You are again advised that at a hearing in deportation proceedings on October 24, 1974, the Immigration Judge found you deportable pursuant to Section 241(a)(2) of the Immigration and Nationality Act, as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of said Act, you remained in the United States for a longer time than permitted. You were granted voluntary departure without expense to the Government to December 31, 1974, with this privilege having been extended to January 31, 1975.
>
> In accordance with your listed departure arrangements, you are directed to surrender the Form I-94, Arrival-Departure Record, to the transportation line at your final United States port, which from your arrangements, would be the China Airlines at Los Angeles, California.

Exhibit at 48.

On January 30, 1975, plaintiff filed this action, alleging his imminent and illegal deportation from this country. The Court upon notice to the parties issued a preliminary injunction prohibiting the removal of the plaintiff from this judicial district. A trial on the merits was held on February 14, 1975. On February 18, 1975, the Court renewed, pending a decision on the merits of this case, its order prohibiting plaintiff's removal from this judicial district.

On February 5, 1975, during the pendency of this action, yet another request for postponement of the voluntary departure date was filed. The record does not reflect the disposition of this particular request.

Plaintiff does not challenge in this action the finding, made at the close of the October 24, 1974 hearing, that he is present in this country after the expiration of his student visa and is therefore a deportable alien. As was noted hereinbefore, during that hearing he conceded his deportability and he waived on the record of that proceeding his right to appeal that finding. Moreover, appeal from such a finding lies not with this Court but with the Court of Appeals. 8 U.S.C. §1105a. Plaintiff's status as a deportable alien having been finally adjudicated against him, he brought this action alleging not that he has a lawful right under the immigration laws to remain in this country but rather that the defendant District Director Perryman has abused his discretion in failing to grant more than one postponement of plaintiff's departure date. Defendants admit at paragraph 2 of their answer that this Court has jurisdiction pursuant to 28 U.S.C. §§1361 (mandamus), 2201 (declaratory judgment) and 2241 (habeas corpus) to entertain an action in which it is alleged that a district director of the Immigration and Naturalization Service has abused his discretion in refusing to grant discretionary relief. See Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206 (1968); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

At trial plaintiff presented several witnesses who are employed at the Children's Hospital and Doctor's Hospital in Columbus, Ohio. These witnesses testified that plaintiff is employed full-time at both of these hospitals and that he works in the allied medical field of respiratory therapy. It was further established at trial that there exists a shortage of such therapists in the Columbus area and that plaintiff, as a skilled respiratory therapist, serves as a highly-valued paramedical employee at both of these Columbus hospitals. Plaintiff insists that the Columbus area has much to lose, and the United States little to gain, if he is deported.

As developed at oral argument during the trial, plaintiff's contention that District Director Perryman abused his discretion in refusing plaintiff a second postponement of departure date is essentially two-pronged: (1) it is alleged that failure to give plaintiff notice of discretionary decisions by the district director, when such notice is required by the Code of Federal Regulations, is an abuse of discretion; and (2) it is alleged that the refusal of the district director to grant further postponements of plaintiff's departure date, when examined in light of the peculiar facts of this case, was an abuse of discretion.

I find no abuse of discretion by defendant Perryman regarding the giving of notice to plaintiff of agency decisions. The correspondence contained in Government's Exhibit 1, which correspondence is outlined hereinabove, indicates that plaintiff was neither misled nor uninformed by the INS concerning his status as an alien. See, e.g., defendant Perryman's December 26, 1974 letter to plaintiff, Exhibit at 40, and Deportation Officer Kowalchik's January 8, 1975 letter to plaintiff's counsel, Exhibit at 42-41.

Further, as to the giving of notice by the INS to an applicant for an extension of time in which to voluntarily depart, 8 C.F.R. §243.4 provides, in part, as follows:

> Written notice of the disposition of the alien's request shall be served upon him, but neither the making of the request nor the failure to receive notice of the decision thereon shall relieve or excuse the alien from presenting himself for deportation at the time and place designated for his deportation.

See also 8 C.F.R. §§103.5 and 242.22. These sections of the regulations adequately place a person subject to deportation on notice that a last minute flurry of petitions and requests for discretionary relief, such as re-opened hearing and stays of deportation deadlines, will not operate to extend the alien's deportation date, unless, of course, such petitions and requests are approved by the INS prior to the deportation date. I therefore find that the alleged lack of notice to plaintiff of certain discretionary INS determinations did not prejudice him in any way, did not operate to extend his date for voluntary departure, and did not constitute an abuse of discretion by any of the defendants.

Plaintiff's second premise is that the district director abused his discretion in refusing to delay plaintiff's departure date because there was no evidence before the director of plaintiff having bad moral character and there was undisputed evidence before him that plaintiff, as a skilled and competent respiratory therapist, is a greatly needed member of the Columbus, Ohio, community. Plaintiff cites no authority for his proposition that these factors are the relevant criteria which the district director should apply in a case involving an alien whose presence in the country was under a student visa and whose status as a student has been terminated. Mr. Kowalchik explained in his January 8, 1975 letter to plaintiff's counsel that INS could perceive no authority under the immigration laws for plaintiff's continued presence in the country after the expiration of his student visa. The regulations provide only that the district director "may grant a stay of deportation for such time and under such conditions as he may deem appropriate." 8 C.F.R. §243.4. It certainly constitutes no abuse of discretion to deny a stay of deportation when under the immigration laws enacted by Congress there exists no foreseeable way for the applicant to effect a change in his status as a deportable alien. This is doubly so in a case such as this, where the district director did in fact exercise his discretion once by extending plaintiff's deportation date from December 31, 1974, to January 31, 1975. This extension should have served to provide plaintiff's employers with an additional period of time in which to

seek a replacement for plaintiff or to adjust their staff schedules accordingly. In view of the expiration of his student status and in view of the unavailability of other visa allotments for plaintiff, his application for a six-month delay of departure time was more in the nature of an attempt to circumvent the immigration laws than an application directed to the sound discretion of the district director. The Court finds no abuse of discretion in the district director's refusal to delay the deportation date beyond January 31, 1975.

With regard to plaintiff's November 14, 1974 "Petition to Classify Preference Status of Alien on Basis of Profession or Occupation," any error in the Department of Labor's determination that plaintiff's training did not entitle him to an 8 U.S.C. §1153(a)(3) preference priority, and any error in the district director's reliance upon that determination, is rendered harmless by the fact that no visa allotments were available to plaintiff under this preference provision. See Exhibit at 42.

The Court having determined that no abuse of discretion occurred in this case, the Clerk will enter judgment for defendants. The injunction entered herein on February 18, 1975, prohibiting defendants from removing plaintiff from this judicial district will remain in effect through Friday, February 28, 1975, and no longer. The Court will not entertain any further motions for stay of this order.

Robert M. Duncan /s/

Supreme Court, U. S.
FILED
MAY 17 1976
MICHAEL RODAK, JR., CLERK

No. 75-1282

In the Supreme Court of the United States

OCTOBER TERM, 1975

GREGORY Y. LAU, PETITIONER

v.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 524 F.2d 1405. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1975. A petition for rehearing was denied on November 25, 1975. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including March 9, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien visitor, admittedly deportable, was improperly denied discretionary relief from deportation.

STATEMENT

Petitioner is a native and citizen of Hong Kong, and was admitted to the United States on a non-immigrant student visa on August 23, 1969 (R. 11, 18).[1] His visa, which had been renewed on several occasions, finally expired on June 23, 1974. Petitioner remained in the United States beyond the authorized period, however, and deportation proceedings were consequently initiated. Following a hearing on October 24, 1974, at which petitioner conceded his deportability (R. 18), he was found to be deportable but was granted the privilege of voluntary departure on or before December 31, 1974 (R. 13).[2]

On November 14, 1974, petitioner filed, pursuant to 8 U.S.C. 1153(a)(3), a petition seeking priority status for the issuance of an immigrant visa on the basis of his occupation (R. 22-34).[3] He attached to that petition documents indicating that, following receipt of his undergraduate degree, he had completed a one-month course in respiratory therapy at the University of Chicago and had been employed full-time during the preceding year as a respiratory therapist (*e.g.*, R. 29A).

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[1]"R." refers to the administrative record. "Tr." refers to the transcript of proceedings in the district court.

[2]Petitioner waived his right to appeal the immigration judge's finding of his deportability (R. 14).

[3]8 U.S.C. 1153 provides for the granting of immigrant visas to nine separate categories of aliens and allocates the available visas among those categories on a priority basis. Petitioner sought to be classified within the third preference category, which is limited "to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." 8 U.S.C. 1153(a)(3).

On December 23, 1974, petitioner requested a six-month extension of the period of his voluntary departure from the United States (R. 38-39). The Immigration and Naturalization Service granted this request in part, advising petitioner by letter dated December 26, 1974, that he could remain in this country until January 31, 1975, but that the period of his voluntary departure would not be extended further (R. 40). The Service also informed petitioner's counsel, by letter dated January 8, 1975, that the period of petitioner's voluntary departure had been extended to January 31, 1975, and that his application for priority status filed on November 14, 1974—even if approved—would not permit him to remain in the United States past that date. The Service explained in its letter of January 8 that (R. 41-42)—

> if the petition * * * for third preference classification was approved, [petitioner] would not be considered for immediate immigrant visa issuance as visa allotments under the third preference category * * * are unavailable. It is our further understanding that there has been no visa allotments under this third preference category for natives of Hong Kong since 1966. Furthermore, there is no authority under current regulations to allow [petitioner] to remain in the United States for an indefinite time to await an immigrant visa on the basis of an approved petition.[4]

On January 20, 1975, petitioner informed the Service's District Director that he had completed arrangements to leave the United States (R. 46-47). He also requested

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[4]On January 16, 1975, the Service received notice of the United States Department of Labor's determination that petitioner's qualifications were insufficient to entitle him to the priority classification he had requested (R. 44).

further consideration of his case by the Service (R. 47). The Service advised petitioner in response that he had previously been found to be deportable and that the period of his voluntary departure, as extended, would expire on January 31, 1975 (R. 48).

On January 30, 1975, petitioner filed suit in the United States District Court for the Southern District of Ohio seeking an injunction against his deportation, a postponement of the scheduled date of his voluntary departure and an order requiring the Immigration and Naturalization Service to act upon his request for an extension of his temporary visa.[5] Although not contesting his deportability, petitioner alleged that denial of his requests for discretionary relief had been arbitrary and capricious. He also sought an order temporarily restraining his deportation pending a hearing in the district court on the merits of his complaint, which the district court granted on January 30, 1975. Following an evidentiary hearing on February 14, 1975, the district court denied petitioner's requests for relief (Pet. App. B). The court of appeals affirmed (Pet. App. A).[6]

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[5]Petitioner alleged in his complaint that he had applied in May of 1974 for an extension of his temporary visa and that such application had been submitted to the Service "a substantial time before the then-existing extension was to expire." In fact, however, the application itself reflects that petitioner had not signed the application until June 19, 1974, and that it had not been received by the Service until July 5, 1974—almost two weeks after his visa had expired (R. 1-2). During the hearing in the district court, petitioner explained that after he had signed the application he had taken it to his college advisor to have it completed (Tr. 57). His college advisor completed the application on June 27, 1974—four days after his visa had expired (R. 2).

[6]On December 30, 1975, Mr. Justice Stewart granted petitioner's request for a stay of the court of appeals' mandate pending the completion of proceedings in this Court (see Pet. 9).

ARGUMENT

Petitioner did not disavow during proceedings before the courts below the concession he made at his deportation hearing that he is presently in this country illegally and is therefore deportable. Neither has he contended before this Court that the finding of his deportability was erroneous or otherwise contrary to law. His contentions relate instead to alleged procedural defects in the Service's disposition of his requests for discretionary relief. But those defects, if any, would not entitle him to relief from deportation or make his presence here legal. In any event, any procedural defects in the denial of his requests for discretionary relief have been cured during this litigation and further review by this Court is therefore not warranted.

1. Petitioner's contention that his application for an extension of his temporary visa was denied without notice to him or a statement of reasons, in violation of applicable regulations (see 8 C.F.R. 214.2 (f)(7)) and his right to procedural due process, is refuted by the record. As stated above (see note 5, *supra*), petitioner did not seek an extension of his temporary student visa until July 5, 1974—almost two weeks after the period of his lawful residency had expired. The Service denied petitioner's request for an extension of his temporary visa on August 21, 1974 (R. 2). On August 26, 1974, the Service informed petitioner by letter that an order requiring him to show cause why he should not be deported had been issued and that a deportation hearing was scheduled for September 26, 1974 (R. 4). The first paragraph of that letter referred to a recent interview involving petitioner and an officer of the Service. Although the record does not reveal the substance of that interview, petitioner's request for an extension of his temporary visa was the only matter

involving petitioner pending at that time—and it therefore appears reasonable to conclude that petitioner was advised during the interview of the fact of and the reasons for the denial of his request for an extension of his temporary visa.

Even if it is assumed, however, that petitioner was not advised during the interview of the denial of his request for an extension of his temporary visa, he could not have been unaware at the time of his deportation hearing that his visa request had been denied. Petitioner—who was represented by counsel—conceded his deportbility at the hearing on October 24, 1974, and requested the privilege of voluntary departure. Had he then believed that his application for an extension of his temporary visa was still pending, he presumably would have so informed the immigration judge. Petitioner's failure to object to his scheduled deportation on the basis of a pending request for an extension of his temporary visa confirms that he knew at that time that his visa request had been denied. If petitioner was dissatisifed with the reasons given him for the denial of his visa request, he should have brought that fact to the immigration judge's attention.

2. Petitioner also contends that the Service did not notify him, as required by 8 C.F.R. 204.1(c)(5), of the denial of his request for priority status for the issuance of an immigrant visa. But petitioner was informed in the course of this litigation that his request for priority classification had been denied and he was given a statement of reasons explaining the basis of that action (Tr. 12-13). Petitioner did not subsequently seek review of the

decision denying his request for priority classification,[7] and nothing that has occurred would prevent his applying to the United States consul in Hong Kong for priority classification after he has returned there. See 8 C.F.R. 204.1(c)(4). In any event, as the Service informed petitioner's attorney on January 8, 1975, petitioner's request for priority classification, even if approved, would not have permitted him to remain in the United States since no permanent visas were available for the visa category in which petitioner had sought to be classified.

3. Petitioner further contends that the Service failed to comply with applicable regulations by denying the request made by him on December 23, 1974, for an extension of the period of his voluntary departure without a statement of reasons. However, the Service granted petitioner a one-month extension of the period of his voluntary departure. The Service advised petitioner by letter of this extension, and informed him that the period of his voluntary departure would not be extended further (R. 40). The Service also advised petitioner's attorney by letter of the extension and that the petition for priority classification would not allow petitioner to remain in the United States beyond the period of his scheduled date of voluntary departure, as extended (R. 41-42). Petitioner was thus adequately advised both of the fact of and reasons for the partial granting of his December 23, 1974, request for an extension of the period of his

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[7]Petitioner could have requested review of the decision denying his request for priority classification at any time within ninety days of the decision. 29 C.F.R. 60.4(b).

departure.[8] Indeed, as the district court observed (Pet. App. 11a):

> In view of the expiration of his student visa and in view of the unavailability of other visa allotments for [petitioner], his application for a six-month delay of departure time was more in the nature of an attempt to circumvent the immigration laws than an application directed to the sound discretion of the district director.

4. Finally, petitioner contends that the Service wrongfully failed to act upon the request made by him on February 5, 1975, for a further extension of the period of his voluntary departure. Before he filed that request, however, the district court had granted his request for a preliminary injunction staying his deportation (Pet. App. 6a). Following entry of the district court's order dissolving that stay, petitioner's deportation was stayed by order of the court of appeals and, subsequently, by order of Mr. Justice Stewart. In these circumstances, the Service was not required to act upon petitioner's February 5, 1975, request for an extension of the period of his voluntary departure since any decision on that request will be meaningless until after proceedings have been concluded in this Court.

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[8]Contrary to petitioner's assertions, the applicable regulations do not require the Service to provide aliens with a statement of reasons supporting the denial of requests for a stay of deportation or for an extension of time within which voluntarily to depart from the United States. See 8 C.F.R. 243.4, 244.2.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1976.